IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

(Before Owens, P.J., and Markey and Murray, JJ.)

PRESERVE THE DUNES, INC.,
A Michigan Not For Profit
Corporation,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY and
TECHNISAND, INC., A Delaware
Corporation,

Defendants-Appellants.

Docket Nos. 122611, 122612

APPELLANT TECHNISAND, INC.'S REPLY BRIEF

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APPELLANT TECHNISAND, INC.'S REPLY BRIEF

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I. INTRODUCTION

The Court can resolve this case by answering a few simple questions. First, is the issue in a MEPA case, under MCL 324.1703, whether "the *conduct* of the defendant has polluted, impaired, or destroyed . . . the air, water, or any other natural resources or the public trust in these resources . . . or will do so in the future." (Emphasis added). See also MCL 324.1704(3) (the court must "adjudicate the impact of the defendant's *conduct* on the air, water, or other natural resources . . .") (emphasis added). Second, did the Legislature intend, as it said in MCL 324.63702(1)(a), that the MDEQ could amend an existing sand mining permit to allow the permit holder to expand into a critical dune area. Third, does either the 60-day statute of limitations of MCL 24.304(1) or the 21-day limitation of MCL 600.631 & MCR 7.104(A) apply to the MDEQ's administrative decision to amend TechniSand's sand mining permit.

Contrary to PTD's and its *amici's* positions (see, *e.g.*, WMLC's Brief, Section II(B), "The Record Shows That This is a Case of Destruction of a Natural Resource"), this appeal is not about TechniSand's conduct. No appeal was taken from the finding that TechniSand's proposed mining did not threaten "the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." *See* MCL 324.1701(1). PTD tried that issue and lost.[1] It elected not to appeal the circuit court's judgment on that point.

PTD's substantive arguments were squarely addressed in TechniSand's Brief on Appeal. TechniSand stands by its previous arguments and offers this reply to reestablish some clarity in and a proper focus on the issue of TechniSand's permit, as well as to address PTD's newly-placed reliance on *Attorney General v Harkins*, ___ Mich App ___; ___ NW2d ___ (2003).

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[1] "[A]ny adverse impact on the natural resources which will result from the sand mining will not rise to the level of impairment or destruction of natural resources within the meaning of MEPA." (J. Maloney's opinion at page 2; page 37a of TechniSand's Appendix.)

II. SAND MINING PERMITS UNDER THE SDMA AND THE MEPA

A. Permitting Requirements Are Not Pollution Standards

MCL 324.1701(2)'s provisions related to standards "for pollution or for an antipollution device or procedure," despite being highly emphasized by PTD and forming the foundation of the Court of Appeals decision, do not apply to the "grandfather" clauses of MCL 324.63702. No "device" is described in § 63702. No pollution or antipollution "procedure" is mentioned in § 63702. What is at issue under the "grandfather" clauses is who TechniSand is, not TechniSand's conduct.

The means by which TechniSand will mine meet every requirement of every applicable statute, regulation and permit related to devices or procedures. PTD's claim is that TechniSand cannot do the proposed mining, even if someone else could, using the same methods and devices.

There are many procedural requirements for obtaining a permit. For example, MCL 324.63704 requires that the permit application be "on a form provided by the department." Under the Court of Appeals and PTD's approach, the requirement of the use of a particular form is a "pollution standard," because it "relates to" the environment, albeit indirectly. MCL 324.63708(4) requires the department to "approve or deny a sand dune mining permit application in writing within 120 days after the application is received and is . . . complete." Under PTD's analysis, a permit approved on the 121st day would violate a "pollution standard," even if it went unchallenged for years, "because it relates to protecting the environment and natural resources from 'pollution, impairment or destruction.'" (PTD Brief at p 12.)

PTD has hyperextended any common sense notion of what a "pollution standard" is. The process by which permits are granted or the rules for determining eligibility for permits simply are not "pollution standards."

B. The Legislature Did Not Prohibit All Mining In Critical Dune Areas

The SDMA allows mining in critical dune areas as follows:

> (1) Notwithstanding any other provision of this part, the department shall not issue a sand dune mining permit within a critical dune area as defined in part 353 after July 5, 1989, except under either of the following circumstances:
>
> (a) the operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to renewal or amendatory application.
>
> (b) The operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989 the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit. [MCL 324.63702.]

The statute says that a "sand dune mining permit" may be "issue[d] . . . within a critical dune area" when the "operator," basically a miner with mineral rights,[2] (a) renews or amends a permit issued before July 5, 1989, *or* (b) amends a permit to add critical dune property, adjacent to the property already covered by the permit, where both the permit and the critical dune property were owned by the mining operation[3] before July 5, 1989.

It is plain that subsection (a) allows the expansion of mining within an existing permit to an area already defined under the permit, and that subsection (b) applies to amendments for expansion into areas not already under permit.[4]

The claim that the Legislature intended to prohibit sand mining in critical dune areas ignores the Legislature's plain language. The Lake Michigan Federation *amicus* brief said that in enacting the SDMA, the Legislature was "Recognizing the economic, cultural, and ecological

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[2] MCL 324.63701(J).

[3] See TechniSand's Brief on Appeal, pp 23-24.

significance of the state's dunes [and] the Legislature in 1989 attempted to strike a balance between allowing mining, but within certain essential limits." (LMF's Brief, p 2.) TechniSand agrees that part of the balance struck by the Legislature was to permit new mining in critical dune areas through the renewal or amendment of permits originally issued before July 5, 1989.

At page 31 of its brief, PTD says that the language of MCL 324.63702(1)(a) "does not include amendments that seek to include additional land in a critical dune area." This imagined limitation does not appear in the language of the statute. Section 63702(1) provides specific exceptions to the general prohibition on issuance of permits "within a critical dune area." There are no exceptions to the exception that is subsection (a). There is no requirement that the "operator" be the same operator to whom the permit was originally issued. The transfer of permits is not prohibited. PTD claims that under subsection (a), a permit can only be amended to allow sand mining in a critical dune area if the permit already allows mining in the critical dune area for which the amendment is sought. The Legislature never said that either.

Under PTD's Catch-22 view of § 63702(1)(a), if TechniSand's permit had a mining plan that extended to the critical dune area of the Taube Site Extension, it could have that permit amended to allow expansion into the critical dune area of the Taube Site Expansion. That is, if it did not need the amendment, it could get it. If the Legislature wanted to prohibit amendment of permits to allow expansion into critical dunes areas, it would not have passed subsection (a), expressly authorizing the MDEQ to amend permits to allow new mining in critical dunes areas.

C. PTD's Interpretation Of § 63702(1)(a) Renders It Meaningless

PTD argues, at page 31 of its brief:

> Plainly, the "renew or amend" language in subsection (a) does not include amendments that seek to include additional land in a critical dune area. If it did,

---

[4] See MCL 324.63702(2), defining the term "adjacent" to mean "land that is contiguous with the land for which the operator holds a sand dune mining permit . . . ."

> subsection (b) would serve no purpose. It would be swallowed up in subsection (a), and there would be *no* limitation, in time or space, to the department's power to enlarge existing permits so as to include critical dunes. Obviously that cannot have been the Legislature's intention, since the whole purpose of § 63702 was to bring an end to the mining of critical dunes.

This is an "absurd result" argument of the sort squarely rejected in *People v McIntire*, 461 Mich 147, 155-159; 599 NW2d 102 (1999), here premised on PTD's agenda to curtail mining. The Legislature can do what it wants. The result need not make sense to PTD. Even assuming that PTD's argument that subsection (a) could allow amendments authorizing permits to mine anywhere in the state is right, the answer is that the Legislature can do that (even though it did not). It can also make subsection (b) the appendix to the body of MEPA if it wants to.

PTD sometimes uses the word "permitted" (as used in subsection (b), for example) to mean "allowed," as opposed to "covered by permit." Nothing supports that strained interpretation. When the statute was passed, TechniSand's predecessor had a permit, which covered 149.5 acres, including the Nadeau Site Expansion. Had Legislature intended to change the definition of "permit" to mean permission to mine only those specific areas from which sand could be removed, it was subtle in the extreme and partially revoked Manley Brothers permit without notice or hearing and took a valuable property right from Manley Brothers without fair compensation. This Court should not assume, as does PTD, that the Legislature intended to violate the Michigan or United States Constitutions by taking property (imposing a restriction on transferability) without just compensation.[5]

---

[5] See, *e.g.*, *Lucas v South Carolina Coastal Council*, 505 US 1003, 1014, 1030-1031; 112 S Ct 2886; 120 L Ed 2d 798 (1992) ("if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." An environmentally-related restriction on land use, there a ban on coastal construction, could be a taking that required just compensation).

If PTD's definition of "permit" were followed, the MDEQ would be hamstrung in enforcing many aspects of permits regulating sand mines, i.e., that they have appropriate fencing, setbacks, protection for threatened or endangered species, properly sloped reclamation areas, proper interior roads and all the other details of the progressive cell-unit mining plan described by § 63706, which must be approved to get a permit under § 63704(c). If only the areas from which sand can be removed are "permitted," there is no document for the MDEQ to enforce regulating those aspects of the mining operation that do not involve the removal of sand. "Permitted land," must mean land covered by permit, not merely land where sand removal is allowed.

TechniSand's reading of MCL 324.63702(1) does justice to the statute's plain language. TechniSand is an operator entitled to an amended mining permit under any construction of the statute. It is the operator of a sand mine, which sought to renew a sand dune mining permit issued prior to July 5, 1989. It complied with the criteria and standards applicable to a renewal or amendatory application, as required by MCL 324.63702(1)(a).[6]

D. TechniSand's Permit Was Properly Amended

If the owner of Blackacre holds a permit for all of Blackacre, but allowing mining only in the eastern half of Blackacre, under § 63702(1)(a), the MDEQ has the authority to amend the permit to allow mining in the western half, even if the only critical dune area on Blackacre is in the western half. Here, the area covered by the permit TechniSand acquired from Manley Brothers is Blackacre. The Taube site is the eastern half. The Expansion is the Western half.

[6] Alternatively, if this Court were to agree with PTD that subsection (a) applies only to allow mining in critical dune areas that can already be mined under existing permits (permitted meaning allowed), then subsection (b) must be read to allow mining in critical dune areas already owned and adjacent to the areas that can already be mined under the existing permit. Thus, TechniSand was eligible for an amended permit under MCL 324.63702(1)(b) for the reasons stated in its Brief on Appeal.

TechniSand's original permit included about 149.5 acres. The 23-acre Nadeau Site and the 126.5-acre Nadeau Site Expansion described at page 3 of PTD's brief were both covered by the permit that the MDEQ amended on November 25, 1996. PTD is wrong when it says "the amended permit *adding the Nadeau Site Expansion* was issued on November 25, 1996." The Nadeau Site Expansion was not *added*. It was always under the permit. What changed was the authorization of a new mining plan, which allowed TechniSand to mine in the critical dune area in the Nadeau Site Expansion. The permit, which covered TechniSand's 149.5 acres well before July 5, 1989, was properly amended under § 63702(1)(a).

Subsection (b) would apply if TechniSand owned Blackacre, the whole of which was included in a permit issued by the MDEQ, and also owned adjoining Whiteacre which was not covered by any permit for sand mining. If there were a critical dune area in Whiteacre, TechniSand would have to apply for an amended permit under MCL 324.63702(1)(b). See **Appendix A** for a graphic illustration.

E. The Statute Read As A Whole Makes Sense

Both subsection (a) and subsection (b) serve a useful purpose. Subsection (a) covers those cases in which an operator, like TechniSand, holds a sand mining permit for a parcel of land, at least part of which is in a critical dune area, but where the permit as originally issued did not allow mining in the entire area covered by the permit, under the mining plan required by MCL 324.63706. Subsection (b) covers situations in which an operator owns a parcel of land covered by a sand mining permit and also owns an adjacent parcel of critical dune, not covered by the existing permit. For the reasons described herein and cited in its Brief on Appeal, TechniSand was entitled to expand its operation under § 63702(1)(a) or, alternatively, § 63702(1)(b).

III. TIME LIMITS & ADMINISTRATIVE DECISIONS

PTD now raises, for the first time, the argument that the permit process was not a "contested case" within the meaning of MCL 24.203(3), which defines contested case, in pertinent part, as "a proceeding, including . . . licensing, in which a determination of the legal rights, duties or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." "License" is defined under MCL 24.205(1) to "the whole or part of an agency permit, . . . or similar form of permission required by law . . . ." The MDEQ required TechniSand to submit proofs. It required and conducted at least one public hearing as part of the permitting process. TechniSand believes that made it a "contested case."

PTD complains that it could not have had notice of the MDEQ decision because PTD did not then exist. There is no requirement in MCL 24.304(1) that the notice of final decision (which was mailed to TechniSand) be mailed to everyone in the universe who might conceivably at some time in his or her life decide to challenge the administrative decision. The time for challenging the permit expired well before PTD filed its claim. PTD has cited no law for its implication that it may avoid the statutory time limit because it did not exist when the final agency notice was served and because it delayed its formation until long after the time for bringing suit expired.

Even if MCL 24.304(1) were not applicable, the general statute of limitations for appealing agency decisions, MCL 600.631, is applicable. *Schommer v DNR Director,* 162 Mich App 110, 120-121; 412 NW2d 663 (1987) (appeal from denial of oil drilling permit governed by MCL 600.631 and MCR 7.104(A)). See also the succinct analysis of the interplay between the two statutes of limitations in the unreported decision in *Township of Sumter v Futernick,* Nos. 189267, 189444, 1997 WL 33347957 (Mich App May 17, 1997), attached as **Appendix B.**

PTD's reliance on *Attorney General v Harkins*, ___ Mich App ___; ___ NW2d ___ (2003), is misplaced. *Harkins*, like *Nemeth v Abonmarche Development, Inc*, 457 Mich 16; 576 NW2d 883 (1975) and *West Michigan Environmental Action Council v Natural Resources Comm'n*, 405 Mich 741; 275 NW2d 538 (1979), dealt with either actual or threatened harm to the environment, not administrative matters concerning eligibility for a permit. *Harkins* involved the filling of lakefront property in violation of a modified permit issued by the MDEQ. The MDEQ's decision to grant the permit was not a concern in *Harkins*. The alleged violation of the permit was the issue. Judge Zahra, writing for the unanimous panel, cited the Court of Appeals decision in this case and aptly distinguished it, saying that this case "contemplates whether a statute of limitations exists regarding an agency's authority to issue a permit." (Slip Op, p 4 n 4.)

Nemeth and *West Michigan Environmental Action Council* were both distinguished at length in TechniSand's Brief on Appeal, to which the Court is referred. Neither case involved any administrative issue.

It is the MDEQ's administrative permitting decision at issue here. There is a statute of limitations in the MEPA related to administrative decisions, and the Court of Appeals was wrong to hold that the MDEQ's administrative decision may be challenged without time limit. See the discussion at pp 13-14 of TechniSand's Brief on Appeal. *Harkins* stands only for the proposition that PTD had six years to get a trial of exactly the sort it received, *i.e.* whether TechniSand's *conduct* threatened the environment.

IV. CONCLUSION

TechniSand is in the business of harvesting a natural resource vital to Michigan's industry and economy.[7] The MDEQ properly amended TechniSand's permit to allow mining in

[7] See the MDEQ's website regarding Michigan's sand dunes and sand dune mining, http://www.michigan.gov/deq/0,1607,7-135-3311_4114---,00.html.

a "critical dune area" that was within the permitted property. The trial on TechniSand's conduct was all that PTD was entitled to under the MEPA. It lost and did not appeal.

The Court of Appeals decision totally abandons all time limits for judicial challenge to the administrative aspects of the environmental permitting process. The decision does violence to the common sense meaning and understanding of words like "pollution control standard" and "conduct," and seriously threatens Michigan's economic future. The Court of Appeals refusal to apply the MEPA and the SDMA as written usurps the Legislature's right to have its statutes enforced according to their unambiguous terms. The decision of the Court of Appeals should be reversed.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS, P.C.

Dated: September 3, 2003

P26792

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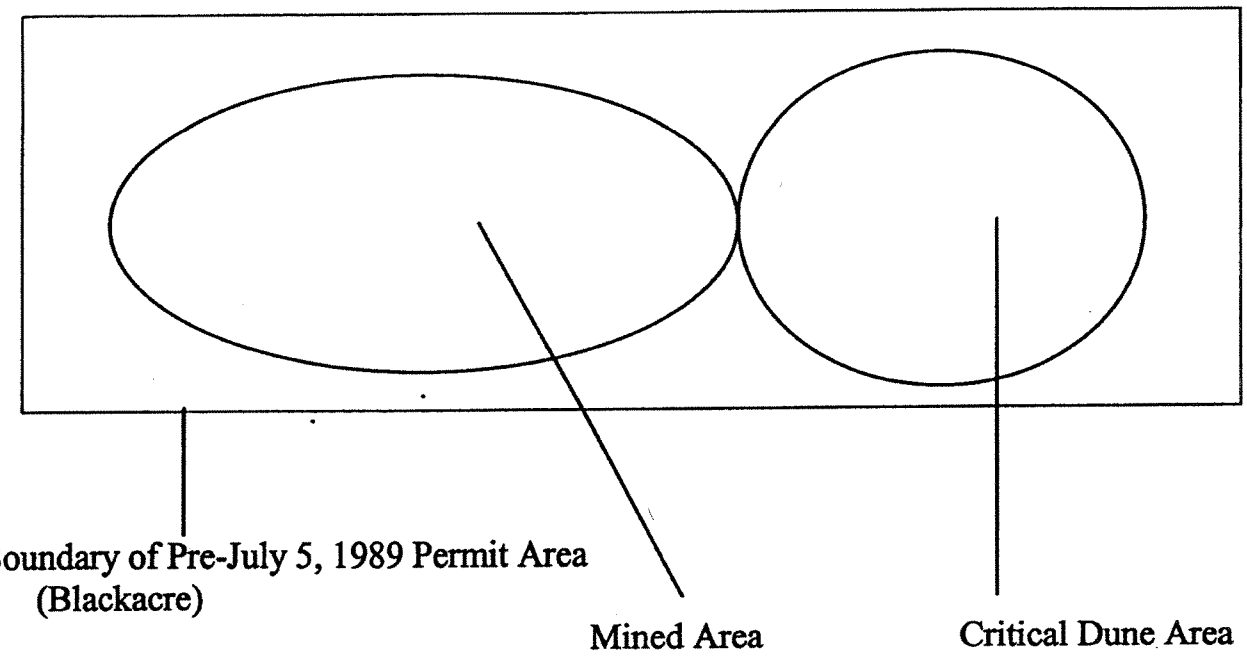
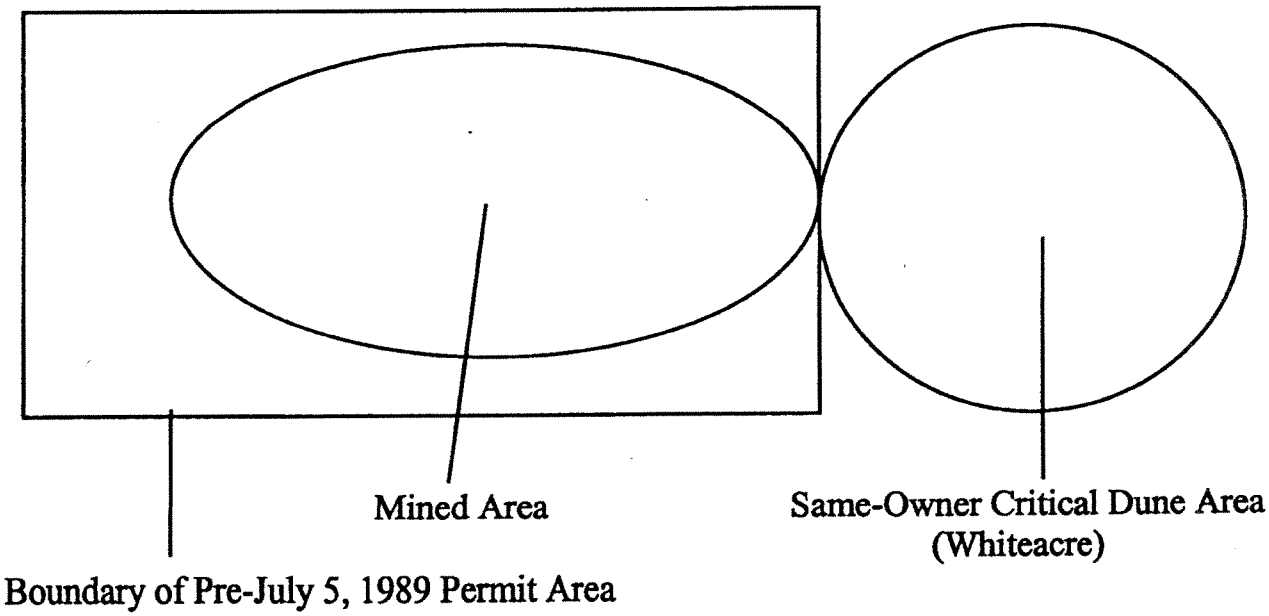
APPENDIX A

MCL 324.63702(1)(a)



MCL 324.63702(1)(b)



APPENDIX B

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

TOWNSHIP OF SUMPTER, Plaintiff-Appellee,
v.
Sheldon FUTERNICK, d/b/a, Holiday West Mobile Homes, Defendant-Appellant,
and
MICHIGAN DEPARTMENT OF COMMERCE, Defendant-Appellee.
TOWNSHIP OF SUMPTER, Plaintiff-Appellant,
v.
Sheldon FUTERNICK, d/b/a, Holiday West Mobile Homes, and Michigan Department of Commerce, Defendants-Appellees.

No. 189267, 189444.

May 16, 1997.

Before: MacKENZIE, P.J., and WAHLS and MARKEY, JJ.

UNPUBLISHED

PER CURIAM.

*1 This dispute involves a mobile home park construction permit issued by defendant Michigan Department of Commerce (the Department) to defendant Futernick (defendant). In No. 189267, defendant appeals as of right from an order denying his motion for sanctions against plaintiff township. In No. 189444, the township appeals as of right from orders granting summary disposition in favor of defendant and the Department. We affirm in both cases.

We first address defendant's claim that the trial court clearly erred in denying his motion for sanctions. MCR 2.114 requires that every document in a legal action must be signed by a party or the party's attorney, and provides that the signature certifies that the signer believes the document is well grounded in fact. If a document is signed in violation of the rule, the court may impose "an appropriate sanction," including reasonable expenses incurred because of the filing of the document. MCR 2.114(E).

Defendant sought sanctions on the basis that plaintiff filed a frivolous pleading by alleging in Count VI of its First Amended Complaint that defendant presented false or altered receipts for additional units, even though plaintiff knew the receipts were authentic. In response to defendant's motion for sanctions, plaintiff submitted affidavits averring that portions of the questioned documents were altered and/or false. While ultimately a question of credibility, this evidence was sufficient to provide plaintiff a reasonable belief that the documents might have been altered. Because the allegations had an arguable basis in fact, the trial court did not clearly err in denying defendant's motion for sanctions. *LaRose Market, Inc v. Sylvan Center, Inc,* 209 Mich.App 201, 210; 530 NW2d 505 (1995).

In No. 189444, plaintiff first contends that the trial court improperly entered an order of summary disposition in favor of the Department, without notice and an opportunity for plaintiff to be heard. We do not agree. On January 20, 1995, the trial court entered an order entitled "Order Granting Defendant Sheldon Futernick's Amended Motion for Summary Disposition and Dismissing Plaintiff's Amended Complaint with Prejudice and without Costs." Both sides then appealed to this Court. We dismissed the appeals because the January 20 order was not a final order appealable by right. The trial court then entered its order of September 14, 1995, which provided that the trial court had intended to dismiss plaintiff's claims against both defendants and had intended on January 20 to grant summary disposition to the Department as well as to defendant.

Under MCR 2.612(A)(1), the trial court had the authority to correct errors arising from oversight or omission on its own initiative. That authority includes amending a judgment to more accurately reflect the actual decision of the court. *McDonald's Corp v. Canton Twp,* 177 Mich.App 153, 159; 441 NW2d 37 (1989). Thus, the trial court did not abuse its discretion in the present case.

*2 Plaintiff next argues that the trial court erred in dismissing its complaint on the basis of the statute of limitations. We disagree. The Department's decision to issue defendant a construction permit application was not a "contested case" within the meaning of the Administrative Procedures Act, M.C.L. § 24.201 *et seq.*; MSA 3.560(101) *et seq.*, and MCR 7.105(A)(2) because no evidentiary hearing was required. Because this was not a contested case, it is governed by M.C.L. § 600.631; MSA 27A.631, which in turn incorporates the applicable court rules. *Schommer v Director, Dep't of Natural Resources,* 162 Mich.App 110, 121; 412 NW2d 663 (1987). Pursuant to the court rules, an appeal from an agency decision must be taken within twenty- one days from the date the agency's order was entered. *Id.* The appeal period is jurisdictional, and untimely appeals may be dismissed for lack of jurisdiction. *Id.* Since plaintiff failed to file its complaint within twenty-one days after the permit was issued, its complaint was barred by the statute of limitations, and the trial court properly dismissed it. Because we conclude that summary disposition was properly granted on the basis of the statute of limitations, we need not address the other issues which plaintiff raises.

Affirmed.

1997 WL 33347957 (Mich.App.)

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PROOF OF SERVICE

The undersigned certifies that on April 8, 2003, she served a copy of the following documents:

1. Appellant TechniSand, Inc.'s Reply Brief; and

2. Proof of Service,

upon the following attorneys, via first class mail, by enclosing the same in a sealed envelope, with postage prepaid thereon, addressed as set forth below, and depositing the envelope and contents in the United States mail:

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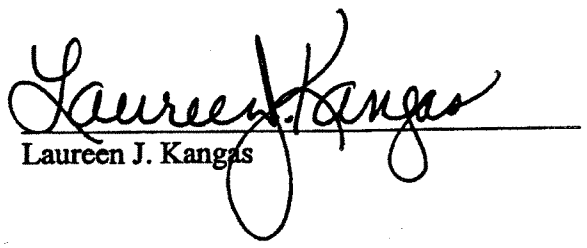

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